

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLAUDE O. GUNNIN, JR. and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Atlanta, GA

*Docket No. 02-1482; Submitted on the Record;
Issued August 26, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$27,181.14, due to the payment of augmented compensation during the period July 28, 1994 through July 14, 2001, when appellant had no dependents; (2) whether the Office properly found appellant was at fault in the creation of the overpayment; and (3) whether the Office properly required repayment of the overpayment by withholding \$450.00 from appellant's continuing compensation every four weeks.

On July 20, 1980 appellant, then a 33-year-old air traffic control specialist, filed an occupational disease claim (Form CA-2), alleging that his psychological condition was due to job stress. The Office accepted the claim for depressive neurosis, with moderate to severe sleep pattern disturbance. Appellant was placed on the periodic rolls for temporary total disability.

Appellant completed annual affidavits of earnings and employment (Form EN1032), which advise, in pertinent part, as follows:

"A claimant who has no eligible dependents is paid compensation at $66 \frac{2}{3}$ percent of the applicable pay rate. A claimant who has one or more dependents is paid compensation at 75 percent of the applicable pay rate. You must answer the question below to ensure your compensation is paid at the correct rate.

"You may claim compensation for a dependent if you have ... (a) a [spouse] who lives with you; (b) an unmarried child, including an adopted or stepchild, who lives with you and is under 18 years of age; (c) an unmarried child who is 18 or over, but who cannot support himself or herself because of mental or physical disability; (d) an unmarried child under 23 years of age who is a full-time student and has not completed four years of school beyond the high school level...."

Appellant submitted EN1032 forms, claiming his wife and stepson as dependents for compensation purposes.

On November 14, 2000 appellant submitted a copy of a final divorce decree dated July 28, 1994.

On November 20, 2001 the Office notified appellant that a preliminary determination had been made that he had been overpaid compensation in the amount of \$27,181.14, because the Office incorrectly paid him compensation at 75 percent of his weekly pay rate (based on appellant having dependents) from July 28, 1994 through July 14, 2001. The Office further stated that appellant was at fault in the creation of the overpayment as he should have known that he had been divorced and no longer had a dependent entitling him to compensation at the augmented rate. The Office advised appellant that he had the right to submit arguments or evidence which he believed would affect the preliminary findings. Appellant was also advised as to the actions he could take within 30 days including requesting a telephone conference or a precoupment hearing before a hearing representative.

In a letter dated December 19, 2001, appellant disagreed with the preliminary determination arguing that he was not at fault and that his wife had deceived him so that he was unaware she had filed for divorce. He stated that he had advised the Office as soon as he was aware of his divorce and asked "what else can I do to prove it?" Appellant also requested the Office to "Please review my case and file."

By decision dated February 1, 2002, the Office finalized its preliminary determination that an overpayment in the amount of \$27,181.14 had been created. The Office further found that appellant was at fault in the creation of the overpayment and that the overpayment would be recovered by withholding \$450.00 from his continuing compensation checks every four weeks.

The Board finds that appellant received an overpayment in the amount of \$27,181.14.

The record indicates that appellant's divorce from his wife became final on July 28, 1994 and appellant continued to receive compensation at the augmented three-quarters rate until July 14, 2001. Since he no longer had any dependents as defined under the Federal Employees' Compensation Act his compensation should have been reduced from three-quarters to the basic two-thirds rate. The basic rate of compensation under the Act¹ is 66 2/3 percent of the injured employee's monthly pay.² When the employee has one or more dependents as defined by the Act, he is entitled to have his compensation argued at the rate of 8 1/3 percent of his monthly pay.³ The record establishes that until appellant's divorce from his wife on July 28, 1994, he was entitled to receive compensation at the augmented rate of 75 percent. Subsequent to his divorce from his wife, from July 28, 1994 to July 14, 2001, he continued to receive compensation at the

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8105(a).

³ 5 U.S.C. § 8110(b). The term wife is defined as a dependent under one of three alternative situations. The Act does not specify as a dependent an ex-wife even though the employee contributed to her support. *See William G. Dimick*, 38 ECAB 751 (1987).

augmented rate, thereby creating an overpayment in the amount of \$32,295.39, the difference between \$289,635.01, the amount appellant was paid at the augmented rate and, \$257,239.62, the amount to which he was entitled. The Office determined that the overpayment was \$27,181.14, which was the amount he was overpaid less the difference for incorrect health benefits deductions taken during the period.⁴ Accordingly, the Office properly determined that appellant received an overpayment of compensation in the amount of \$27,181.14 during the period July 28, 1994 through July 14, 2001.

Appellant contends that he was entitled to augmented compensation because he supported his stepson. The Board notes that an unmarried child, including an adopted or stepchild, who is living with the claimant and is under 18 years of age may be a dependent.⁵ However, the case record contains no evidence that appellant's stepson continued to live with him following the July 28, 1994 divorce. Appellant has not established that he had any dependents under the Act, following his July 28, 1994 divorce. His compensation should have been reduced from the augmented 75 percent rate to the basic 66 2/3 rate.

The Board further finds that appellant was at fault in the creation of the overpayment for the period July 1994 to November 13, 2001.

Section 8129(a) of the Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.⁶ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and, when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."⁷ No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is at fault, section 10.433(a) of the Code of Federal Regulations provides in relevant part:

"An individual is with fault in the creation of an overpayment who --

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to furnish information which he or she knew or should have known to be material; or

⁴ The Office deducted \$9,132.07 for health benefits when the correct amount should have been \$3,917.82.

⁵ See *James Hopkins*, Docket No. 93-2254 (issued September 7, 1995).

⁶ 5 U.S.C. § 8129(a).

⁷ 5 U.S.C. § 8129(b).

(3) Accepted a payment which he or she knew or should have been expected to know was incorrect.”⁸

In this case, the Office applied the second standard in determining that appellant was at fault in creating the overpayment. In its preliminary determination of November 20, 2001 and its February 1, 2002 decision, the Office found that appellant was at fault in the matter of the overpayment because he failed to furnish information material to his receipt of compensation, *i.e.*, his divorce of July 28, 1994. The Office should have been immediately notified of the change in the status of his claimed dependents.⁹ In his decision of February 1, 2002, the hearing representative found that appellant was at fault in the matter of the overpayment because appellant should have been aware that his compensation should have decreased following his divorce from his wife. He also found that appellant failed to provide any plausible explanation medical evidence to support his contention that he was unaware of the divorce.

The Board finds that appellant failed to furnish information which he knew or should have known to be material when he failed to immediately report a change in status of a claimed dependent upon his divorce and that this failure rendered him at fault in the creation of the overpayment for the period July 1994 to November 13, 2001. The Board also finds that the evidence of record shows that appellant was aware of the reporting requirements as he provided information on his employment, dates he was employed, the type of work and the rate of pay on the EN1032 forms he submitted.

Between 1981 and 2000, appellant completed several EN1032 forms, which informed him of the need to immediately report a change in status of claimed dependents. Each of the EN1032 forms completed during this period indicated that the basic rate of compensation was 66 2/3 percent of the applicable pay rate if the claimant had no eligible dependents and that compensation was payable at 75 percent of the applicable pay rate if one or more dependents was eligible for compensation. The forms indicated that the claimant might claim additional compensation for a dependent and listed the individuals who qualified as dependents, including a spouse who was a member of the claimant’s household. Further, each form indicated that the signer of the form understood that he or she must immediately report to the Office any change in the status of claimed dependents and appellant signed and dated each form.

The manner in which appellant completed the EN1032 forms shows that he knew or should have known the circumstances under which augmented compensation may be claimed and the need to immediately report to the Office any change in the status of his claimed dependents. On each of the EN1032 forms completed prior to appellant’s divorce, he claimed his wife as a dependent. However, the Form EN1032 completed on November 14, 2000 is the first Form EN1032 that appellant indicated that he was no longer claiming a dependent due to the divorce from his spouse. This was material information that he knew or should have known that he was to furnish to the Office in connection with the receipt of augmented compensation.

⁸ 20 C.F.R. § 10.433(a) (2001).

⁹ Appellant informed the Office of the change in dependent status in a Form EN1032 signed by appellant and dated November 14, 2000. The Office made no change in the amount paid appellant until July 14, 2001, when appellant’s compensation rate was changed to 66 2/3 to reflect that he no longer had any dependents.

Appellant completed several EN1032 forms, which apprised him of the need to immediately inform the Office of a change in status of claimed dependents and that any change in status of claimed dependents should be reported in a timely manner. The Board finds that appellant did not timely notify the Office of his divorce which occurred on July 28, 1994 and his failure to notify the Office until November 14, 2000, almost six years after the fact, constitutes failure to timely furnish material information as defined in 20 C.F.R. § 10.433(a)(2).¹⁰ While the Office may have been negligent in continuing to issue appellant checks for disability at the three-quarters rate after he notified it that he was no longer claiming any dependent, this does not excuse his acceptance of such checks for the period July 1994 to November 13, 2000.¹¹

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations provides in relevant part:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.”¹²

In the present case, a review of the record indicates that the Office gave full consideration to the factors delineated in 20 C.F.R. § 10.433(b). In its February 1, 2002 decision, the Office stated that, in determining whether appellant was at fault in the creation of the overpayment, it had considered his age, intelligence, comprehension, education, familiarity with the compensation system, consistency of actions and clarity of correspondence in determining whether he was reasonably aware of his reporting responsibilities and his responsibility to return the checks which were not adjusted to the two-thirds compensation rate.

The Board finds that appellant was at fault in the creation of the overpayment of compensation for the period July 1994 to November 13, 2000 and that, therefore, the overpayment is not subject to waiver.

The Board finds that the Office improperly found that appellant was at fault in the creation of the overpayment for the period November 14, 2000 to July 14, 2001.

In this case, there is no evidence that appellant failed to provide material information to the Office for the period November 14, 2000 to July 14, 2001 as he had notified the Office of his divorce on November 14, 2000. The Board finds that there is no evidence that appellant failed to provide material information to the Office at the time he received his compensation checks for the period November 14, 2000 to July 14, 2001. As appellant provided the relevant information to the Office on November 14, 2000, the Office improperly found appellant was at fault in the

¹⁰ See *Madge H. Gurr*, 39 ECAB 1124, 1129-31 (1988) (finding that failure to notify the Office of a change in status of a claimed dependent almost six months after the fact constituted failure to promptly furnish material information as defined in 20 C.F.R. § 10.433(a)(2)).

¹¹ See *Larry D. Strickland*, 48 ECAB 669, 673 (1997).

¹² 20 C.F.R. § 10.433(b).

creation of the overpayment for the period November 14, 2000 to July 14, 2001. Therefore, on remand, the Office should determine appellant's eligibility for waiver for the period November 14, 2000 to July 14, 2001.

The case will be remanded for the Office to determine the amount of the overpayment and appellant's eligibility for waiver for the period November 14, 2000 to July 14, 2001. It is premature for the Board to address the issue of repayment of the overpayment for appellant's continuing compensation payments.

The February 1, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
August 26, 2003

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member